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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-193398

ACC 00026

DATE: November 27, 1979

Employees

MATTER OF: Social Security Administration - [Payment of Night Differential to]

- DIGEST:**
1. Night differential under 5 U.S.C. § 5545(a) (1976) is payable not only to employees who regularly work a night shift but also to employees who perform occasional overtime during a scheduled night shift, not necessarily in their tour of duty. However, the scheduled night tour must be in the same office or work unit and must not be a special shift established for the convenience of one employee. See Comp. Gen. decisions cited.
 2. Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. § 5545(a) (1976) when they habitually and recurrently perform overtime at night due to the nature of their employment which requires them to remain on duty until their tasks are completed or until they are relieved from duty. See Comp. Gen. decisions cited.
 3. Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. § 5545(a) (1976) where such overtime is considered "regularly scheduled work." Regularly scheduled means duly authorized in advance (at least 1 day) and scheduled to recur on successive days or after specified intervals. The overtime need not be subject to a fixed schedule each night but it must fall into a predictable and discernable pattern. See Comp. Gen. decisions cited.

ACC 00022 - This decision is in response to a request from the Department of Health, Education, and Welfare (HEW) concerning the payment of night differential to employees of the Social Security Administration (SSA) who perform occasional overtime work at night. The question raised by SSA is what constitutes "regularly scheduled work" as the phrase is used in 5 U.S.C. § 5545(a) (1976) which authorizes payment of night differential to certain employees who perform work between the hours of 6 p.m. and 6 a.m.

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The Social Security Administration has various employees who, on an irregular or occasional basis, perform overtime work between the hours of 6 p.m. and 6 a.m. The agency has not paid night differential to its employees for such work on the ground that it was not regularly scheduled work or it was not performed during a regularly scheduled tour of duty falling between the hours of 6 p.m. and 6 a.m. See 34 Comp. Gen. 621 (1955). However, in view of more recent decisions of our Office, SSA has asked us whether overtime work in various factual situations constitutes "regularly scheduled" work so as to entitle the employees performing such work to the payment of night differential. While we cannot make determinations in all the situations, we shall clarify the general rules to be applied in determining when night differential is payable in connection with overtime work performed on an irregular or occasional basis. Also, to the extent feasible, we shall apply such rules to the factual situations presented to us. This decision concerns only the entitlement of these employees to night differential for overtime work which would be in addition to overtime or holiday pay payable under either title 5, United States Code, or the Fair Labor Standards Act.

The authority for the payment of night differential is contained in 5 U.S.C. § 5545(a) (1976), which provides, in pertinent part, as follows:

"Except as provided in subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m. * * *."

It is clear that employees who regularly work a night shift are entitled to night differential added to their basic compensation. See, for example, 36 Comp. Gen. 657, 659 (1957) citing the legislative history of the statute. In addition, our decisions have held that any occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m. which falls within a regularly scheduled tour of duty, but not necessarily his scheduled tour, will result in the payment of night differential. 34 Comp. Gen. 621 (1955); 33 id. 4 (1953); and B-174688, February 28, 1972. See also 5 C.F.R. § 550.122(d) (1978). In this regard, we believe the scheduled tour of duty must be in the same office or unit in order to qualify for night differential under these decisions. See 36 Comp. Gen. 657, supra. Thus, where a special workweek

is created for SSA "schedulers" from Wednesday through Sunday, this would constitute a regularly scheduled tour of duty for other data processing employees in the same office or unit who normally work Monday through Friday but who occasionally work at night on Saturday or Sunday. On the other hand, where the agency has established a special midnight work shift for the personal convenience of only one employee, we do not believe that constitutes a regularly scheduled tour of duty for other employees who occasionally perform overtime outside their regular tours of duty but during this special tour of duty.

Where there is no established tour of duty or shift which falls between 6 p. m. and 6 a. m., our decisions have allowed payment of night differential for overtime work performed during those hours in the following two situations. First, we have allowed the payment of night differential to an employee who habitually and recurrently performs overtime work at night where, by virtue of the inherent nature of his employment, he is required to remain on duty until the completion of his task(s) or until relieved from duty. 42 Comp. Gen. 326 (1962); 41 id. 8 (1961); and Nathaniel R. Ragsdale, B-181237, April 15, 1975. See also Aviles v. United States, 151 Ct. Cl. 1 (1960). Such cases often involve security guards or couriers who may not perform night work according to a fixed hours-of-work pattern but who do so for such a sufficiently long period of time that it becomes usual or customary. See Ragsdale, supra.

In this regard we do not believe that the overtime required by large caseloads and chronic understaffing in SSA claims processing centers results from the inherent nature of the work performed by employees processing claims as contemplated in our decision in 41 Comp. Gen. 8, supra. The record indicates that the work could be done at any time and has been done by employees on a voluntary basis. Therefore, in the absence of scheduled tours of duty, such overtime work at night would appear to qualify for night differential only if considered "regularly scheduled work" as discussed below. On the other hand, where a day shift nurse and physician remain on the scene of a medical emergency as long as necessary, such overtime would be considered part of the inherent nature of their employment so long as such medical emergencies occurred habitually and recurrently, not just occasionally.

The second situation in which we have allowed payment of night differential in the absence of an established tour of duty or shift is where the overtime work to be performed is considered to be "regularly scheduled work." Our decisions have held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. 42 Comp. Gen. 326, *supra*; 40 Comp. Gen. 397 (1961); Robert C. Austin, B-188686, May 11, 1978; and B-174388, February 28, 1972. This is to be distinguished from overtime which is scheduled on a day-to-day or hour-to-hour basis. See 52 Comp. Gen. 319, 322 (1972); B-151168, May 25, 1976; and B-168048, February 16, 1970.

The overtime must be scheduled in advance. In this regard we held in 37 Comp. Gen. 1, 3 (1957) that the term "scheduled" in reference to call-back overtime under 5 U.S.C. § 912a, now codified in 5 U.S.C. § 5542(b)(1), meant notification to the employee prior to the beginning of the workweek. However, later decisions have looked to notification 1 to 4 days in advance of the work as sufficient to constitute overtime scheduled in advance under 5 U.S.C. § 5542(a). See 52 Comp. Gen. 319, *supra*; 48 *id.* 334 (1968). Thus, for the purposes of the payment of night differential, we hold that overtime is considered scheduled in advance so long as notification is made at least 1 day prior to the performance of overtime. It would not be necessary, as suggested by SSA, to restrict the scheduling requirement to situations where notification was given 7 days prior to the event or any time prior to the workweek in which the event occurs.

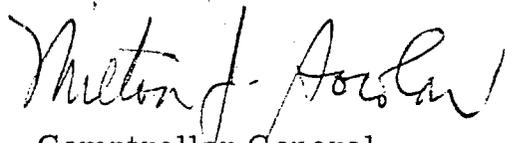
However, it is not merely sufficient that the overtime be scheduled in advance in order to be considered "regularly scheduled." As noted above, the overtime must also be scheduled to recur on successive days or after specified intervals. See Austin, *supra*. Overtime which will be performed every other week or 1 or 2 days every month has been considered regularly scheduled. See 39 Comp. Gen. 73 (1959); and B-159040, July 12, 1966. Thus, where an SSA building inspector must perform 3 hours of overtime the first Friday of every month, such overtime may be considered regularly scheduled. Similarly, where SSA's Bureau of Data Processing regularly schedules (pursuant to union agreement) overtime 3 or more days each week to cope with workload demands, such

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overtime may be considered regularly scheduled. The same answer would apply to test administrators who give courses and tests to night shift employees 24 times per year and to Program Service Center employees who perform 2 or more hours of overtime for each shift for periods of 2 to 5 workweeks or more.

The overtime need not be subject to a fixed hours-of-work schedule but it must recur so frequently and at such regular intervals as to fall into a predictable and discernable pattern. See Customs Special Agents, B-191512, October 27, 1978; and B-178653, August 6, 1973. Thus, overtime work which we would not consider "regularly scheduled work" for the purposes of night differential would include situations where a work completion deadline resulted in extensive overtime which was apparently not authorized in advance or scheduled to recur on successive days or after specified intervals. Similarly, where computer operators performed overtime to correct malfunctions or run new programs but only on 16 occasions over a period of 3 years, such overtime would not be considered regularly scheduled work.

Finally, we have been advised that SSA has received over 1,000 overtime claims involving the performance of irregular or occasional overtime at night. Such claims should be processed in accordance with the above. Also, the proposed SSA regulations (Manual Circular) regarding payment of night differential, which accompanied the HEW request for a decision, should be revised in accordance with the guidelines in this decision prior to issuance.



For The Comptroller General
of the United States